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CASE NO. 82–542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF OHIO, EX REL.
HELEN EARNHART,

Petitioner,

v.

OHIO POWER SITING BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE STATUTORY PROCESS FOR DETERMING WHERE MAJOR UTILITY FACILITIES MAY BE SITED IN OHIO HAS AFFECTED ANY COGNIZABLE PROPERTY INTEREST OF PETITIONER IN A MANNER SUCH THAT THE PROCEDURAL DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION HAVE BEEN VIOLATED.

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STATEMENT OF THE CASE

The following is presented in amplification of Petitioner's Statement of the Case:

The Masury-Greenville Line is a 138,000 volt electric transmission line. It is approximately seventeen miles long extending from Ohio Edison Company's Masury Substation in Masury, Ohio to Pennsylvania Power Company's Greenville Substation in Greenville, Pennsylvania.

To comply with Sections 4906.06(B) and (C) of the Ohio Revised Code, Ohio Edison published "Notice of the Proposed Facility" with accompanying route map in both the *Youngstown Vindicator* and the *Sharon News-Herald* on August 15, 1977, and again on December 2, 1977, placed copies of its Application in the Warren Public Library, Trumbull County, and served copies of the Applications on a number of local officials including the Trumbull County Commissioners, the Brookfield and Hartford Township Trustees, and the Trumbull County Planning Commission.

On June 23, 1978, after the public notice described above was published and after holding two public hearings and after considering the case record, Respondent, Ohio Power Siting Board, issued a Certificate of Environmental Compatibility and Public Need to Ohio Edison Company for its Masury-Greenville Transmission Line. (Petitioner admits that the statutory notice and hearing provisions were complied with by Respondents).

The Board's decision to issue the Certificate included a finding that the Masury-Greenville Transmission Line was needed in order to avoid overloaded lines in northeastern Ohio and northwestern Pennsylvania. It also included a finding that the route certificated by the

Board represented the minimum adverse environmental impact considering the alternatives available and a finding that construction of the line was in the public interest.

The Certificate issued by the Power Siting Board to Ohio Edison for the Masury-Greenville Line applies only to that part of the line that is in Ohio. The Ohio part of the line is approximately ten miles long and extends from the Masury Substation to the point south of Orangeville, Ohio where the line crosses the Ohio-Pennsylvania border. Construction of the Masury-Greenville Line has been completed. All poles have been installed and the wire strung on all segments of the line, including the segment on Miller Street immediately adjacent to the Masury Substation where the Petitioner resides.

SUMMARY OF ARGUMENT IN OPPOSITION TO ALLOWANCE OF WRIT

Petitioner's arguments that the process whereby the Ohio Power Siting Board certificated Ohio Edison Company's Masury-Greenville Transmission Line violated her Fourteenth Amendment due process rights fail for several reasons. Her arguments fail initially because Petitioner did not establish two critical threshold facts. First, Petitioner does not, as she cannot, establish that the process whereby major utility facilities are sited in Ohio directly "impairs" the property of any owner on the route where the power plant or line is permitted to be located. Second, under Ohio law and the facts of the instant case, Petitioner has no cognizable property interest that has been "impaired" by the installation of the Masury-Greenville Line in the road right-of-way on Miller Street.

Finally, even if the Constitutional issue raised is reached, long-standing and well established decisions of this Court make clear that Petitioner's due process rights

have not been violated by the Ohio Power Siting Board. This Court has consistently held that the kind of decision made by the Ohio Power Siting Board, namely, the need for and the proper extent of land needed for a public purpose (in the instant case an electric transmission line), does not require any notice to potentially affected landowners. Hence, Petitioner's allegation of unconstitutionality should be rejected by this Court.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

THE STATUTORY SCHEME IN CHAPTER 4906 OF THE OHIO REVISED CODE FOR THE SITING OF MAJOR UTILITY FACILITIES, INCLUDING PROVISION FOR HEARINGS HELD PURSUANT TO CONSTRUCTIVE NOTICE BY NEWSPAPER PUBLICATION, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The decision of the Ohio Power Siting Board as to where a major utility facility may be located does not in and of itself authorize the installation of such a facility at said location. Hence, the decision of the Power Siting Board does not affect any property interest of Petitioner.

It is elemental that before the procedural due process rights of the Fourteenth Amendment to the United States Constitution become applicable to a process, such process must be capable of resulting in the deprivation of a person's property. Sections 4906.04 and

4906.98 of the Ohio Revised Code prohibit a person from constucting and operating a major utility facility without a certificate therefor from the Ohio Power Siting Board. Hence, certification only results in the elimination of the prohibition.* It clearly does not alter the fundamental principle that the certificate holder may not construct the proposed facility on land that it does not own or on land where it does not have the permission of the landowner.

Moreover, the Ohio Power Siting Board has no eminent domain authority. Although electric utility companies have been given the power of eminent domain to appropriate any land or interest therein as is deemed necessary for the operation of their facilities (Section 4933.15 of the Ohio Revised Code), certification by the Board does not give a utility any special status for eminent domain purposes. Hence, it is clear that Board certification of the need for such a facility and Board certification of where such facility may be located, does not result in the deprivation of any person's property.

In making her argument that the process whereby the Power Siting Board decides where a major utility facility may be located infringed upon her Constitutional due process rights, Petitioner simply ignores the above-described limited nature of the Power Siting Board's process. Petitioner does not explain how the Board's decision as to where a major utility facility may be located "impairs" her property. Hence, Petitioner's argument fails as Petitioner has not established the

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* Section 4906.13 of the Ohio Revised Code provides that certification of a project does preclude certain other agencies and political subdivisions from requiring additional approvals for the project.

critical nexus between the Power Siting Board's process and the alleged "impairment" to her property.*

B. Under Ohio law, the installation of an electric transmission line in a highway right-of-way does not constitute an additional burden upon the abutting property. Hence, under the facts of the instant case, no cognizable property right of Petitioner has been impaired and therefore, no Fourteenth Amendment due process rights of Petitioner have been violated.

Assuming arguendo that the power siting process under Chapter 4906 of the Ohio Revised Code can result in the deprivation of a person's property, Petitioner still cannot assert any violation of her due process rights because under the facts of the instant case, no cognizable property interest of Petitioner has been "impaired."

Petitioner claims that as an abutting property owner, Petitioner has a property interest in the road right-of-way that is "recognized, protected and entitled to certain benefits under the laws of the State of Ohio." While that may be true as a general statement, it is well settled under Ohio law that the installation of an electric transmission line in the public highway right-of-way does not constitute an additional burden upon the abutting property. *Smith v. Central Power Co.*, 103 Ohio St. 681, 137 N.E. 159

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* It is arguable that Petitioner has conceded this point as Petitioner in her Statement of the Case states that "although the Line's construction has been. . .completed, *Ohio Edison Company* has not paid Petitioner compensation in money, . . .a precondition of *its ability to exercise condemnation powers*. . ." (emphasis added).

(1921) (The installation of electric lines in a road right-of-way did not impair the property interest of abutting owner); *Franko v. Ohio Edison Co.*, 71 Ohio Law Abs. 221, 130 N.E. 2d 383 (Ct. App. Mahoning Cty., 1954), *appeal dismissed,* 162 Ohio St. 244, 122 N.E. 2d 792 (1954) (Where a street has been dedicated for the use of the public, the only limitation upon a public utility is that the poles shall not interfere with the abutting property owner's rights of access, light, air and view); *Walton v. The Cincinnati, Milford & Blanchester Traction Co.*, 17 Ohio App. 34, 20 Ohio L. Rep. 632 (Clermont Cty., 1922) (The prior approval of an abutting property owner is not required for the installation of an electric line in the road right-of-way); *Huss v. Toledo Railways & Light Co.*, 25 Cir. Ct. Rep. (n.s.) 44, 26 Cir. Dec. 181 (Ct. App. Lucas Cty., 1915) (The erection and maintenance of an electric line in a street right-of-way does not invade the rights of an abutting property owner). *See also The Ohio Postal Telegraph-Cable Co. v. Smith et al.*, 128 Ohio St. 400, 191 N.E. 698 (1934) (The location of telephone poles within the limits of a highway is not an additional burden upon the easement nor an invasion of the property rights of an abutting owner); *Heck v. General Telephone Co.*, 72 Ohio Op. 2d 146 (C.P. Montgomery Cty., 1975) (The poles and lines of a telephone company do not constitute an additional burden and servitude upon the abutting property for which the owner is entitled to compensation when such facilities are located wholly within the boundaries of an easement granted by the abutting property owner for highway purposes).

In *Central Power Co., supra,* in holding that the installation of an electric line in a highway did not constitute an additional burden on an abutting property, the concurring opinion of Chief Justice Marshall states:

> *The evolution of public utilities and the widespread and ever-increasing use of*

public utility service throughout the state have greatly varied the uses of the streets and highways. It is doubtful whether this great variety of uses has really increased the burdens. . . .It has been found more economical as well as more speedy to transport merchandise and passengers by rail, to convey electrical energy for light, heat and power and to transmit messages and information by wires, and to convey gas for fuel and lighting and water for municipal purposes by pipe lines, and other utilities by still other and different methods. It is hardly correct to say that by such new adaptations the streets and highways are subjected to uses not contemplated when highways were laid out many years ago. *It would be more correct to say that present uses are the progression and modern development of the same uses and purposes.* . . .

It is also a significant fact that a large part of the cost and expense of improvement of the streets and highways is paid out of public funds. *The public should therefore be entitled to an amplified use of that which it has furnished material aid in improving.* . . .

As civilization has progressed, specialization has also progressed, and now nearly all the wants of human-kind are the subject of interchange and traffic. The resulting commercial intercourse has by a process of evolution almost bordering on revolution made our streets and highways those busy arteries of com-

> merce, and has given rise to such suits as the case at bar. Some of our courts have not kept step with the procession, while *others have adopted and followed that broader view of the relation between the abutting property rights and the adjacent highway easements and privileges [that certain new uses of a road right-of-way do not constitute an increased burden upon abutting property].* Surely *the latter line of decisions has correctly sounded the true doctrine* (emphasis added). 103 Ohio St. at 692-95.

The Ohio Supreme Court in *Ziegler v. Ohio Water Service Co.*, 18 Ohio St. 2d 101, 247 N.E. 2d 728 (1969), reaffirmed the *Central Power Co.* holding as to the broad uses permitted in a highway right-of-way. In *Ziegler* the Court held that the construction and maintenance of an underground water pipeline in the highway right-of-way did not constitute an added burden on the abutting property for which compensation must be awarded. In so holding, the Court stated:

> The question in the instant case is whether the intended use of the land, subject to the easement of the state for a highway, is an added burden on plaintiff's property.
>
> Obviously, highways are primarily for the use of the public, in traveling from place to place. Although modern-day travel on our highways is predominately by motor vehicle, *highways certainly are not limited to such use. The effect of the use of a highway upon abutting land has always been variable and subject to change. The complexities of modern life*

> *have produced uses of highways which would have been unheard of at the time many easements for public highways were granted.*
>
> We are unable to discern any substantial burden visited on plaintiff's property by the intended construction. *A denial of the use of a highway for the purpose of transporting water to areas where it is needed, as in the instant case, would be the rejection of evolutionary change.* See 5 Restatement of the Law, Property, Section 479. We therefore hold that the construction of water pipes in real property, for which an easement for highway purposes has been given, is not an added burden on such land, for which the owner must be compensated (emphasis added). 18 Ohio St. 2d at 105-106.

Hence, it is clear that the Ohio courts have adopted a broad and progressive view as to what uses are permitted in a highway right-of-way. Specifically, Ohio courts have held that the installation of an electric line in a highway right-of-way does not constitute an additional burden upon an abutting property for which an owner is entitled to compensation. Under Ohio law then, Petitioner has no cognizable property interest that has been affected because Petitioner is claiming an "impairment" solely based upon the construction of an electric transmission line in a road right-of-way and her status as an abutting property owner. As a result no Fourteenth Amendment due process rights of Petitioner have been violated.

To the extent that the cases cited by Petitioner on this issue hold that the installation of an electric line

in the highway right-of-way constitutes an additional burden on the abutting property, such cases were overruled by the more recent *Central Power Co., supra,* and *Ziegler, supra,* opinions of the Ohio Supreme Court. *Central Power Co., supra,* expressly overruled *Callen v. Columbus Edison Electric Light Co.,* 66 Ohio St. 166, 64 N.E. 141 (1902), one of the cases cited by Petitioner. 103 Ohio St. at 703.

C. Under applicable and well established case law, the State of Ohio is under no Constitutional obligation to give Petitioner or any other similarly situated person any notice of a hearing to determine where a major utility facility may be located.

Even assuming arguendo that the construction of the electric transmission line in the highway right-of-way adversely affected a property interest of Petitioner and assuming there exists some undefined connection between Chapter 4906 of the Ohio Revised Code and Ohio eminent domain law, the Board was, nevertheless, under no obligation to give Petitioner any notice of the hearing that considered the location of said line.

The Board is under no obligation to give Petitioner any notice of such a hearing because no notice is required to be given for the kind of decision that the Power Siting Board makes, namely, the necessity for and the proper extent of land needed for a public purpose (an electric transmission line). This is true even if a utility finds it necessary to invoke its eminent domain powers to secure the land where the Board has indicated the line may be located.* *North Laramie Land Co. v. Hoffman,* 268

*Under Ohio eminent domain law, Petitioner would, of course, be entitled to notice and a hearing in connection with an appropriation proceeding. *See* Section 163.07 of the Ohio Revised Code.

U.S. 276 (1925); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668 (1923); *Bragg v. Weaver*, 251 U.S. 57 (1919); *Sears v. City of Akron*, 246 U.S. 242 (1918); *Joiner v. City of Dallas*, 380 F. Supp. 754 (N.D. Tex. 1974), *affirmed* 419 U.S. 1042, *reh. den.* 419 U.S. 1132 (1975); *Government of the Virgin Islands v. 19.623 Acres of Land*, 536 F. 2d 566 (3rd Cir. 1976).

In *North Laramie, supra*, this Court stated that "the necessity and expediency of the taking of property for public use 'are legislative questions, *no matter who may be charged with their decision*, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment'" (emphasis added). 268 U.S. at 284.

In *Joslin Mfg. Co., supra*, this Court held:

> The validity of the act is challenged as denying due process of law, on the ground that the question of the necessity for taking the property has not been determined by the Legislature itself, but is relegated to the city to decide ex parte, without appeal or opportunity for hearing and decision by an impartial tribunal. That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. . . .*The question [necessity]* is purely political, *does not require a hearing, and is not the subject of judicial inquiry* (emphasis added). 262 U.S. at 678.

In *Bragg* this Court stated that "where the intended use is public, *the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate.* They are legislative questions,

no matter who may be charged with their decision. . ." (emphasis added). 251 U.S. at 58.

Petitioner cites no case that limits or distinguishes the above-cited holdings of this Court. Instead, Petitioner simply assumes that notice is required and cites this Court several cases that discuss the quality of notice required for due process. Such holdings are, of course, inapposite to the above cases cited by Respondent.

In the *Joiner* case, the above well established precedents of this Court were challenged by the plaintiffs in light of certain more recent due process cases of this Court. The District Court found this argument unpersuasive. Plaintiffs also attempted to distinguish the above-cited cases on the ground that the City of Dallas was acting *administratively* and not legislatively when it decided to take plaintiffs' properties. Even though the plaintiffs were technically correct under Texas law, the Court rejected the argument because the power of eminent domain is a unique sovereign right and its "character cannot be changed by the label under which it is pursued." 380 F. Supp. at 771. Hence, even though the Power Siting Board makes its decision in an administrative, quasi-judicial context, the fundamental nature of that decision is not altered and the holdings of the above-cited cases make clear that the Board is under no Constitutional obligation to give Petitioner any notice of its proceedings.

In *Government of the Virgin Islands, supra,* the Court of Appeals overturned the District Court's holding that where the government decides to conduct a public hearing before deciding to condemn certain land, it must, in accordance with the due process clause of the Constitution, give personal notice of the hearing to those owners whose property is a potential target of the planned taking. The District Court reached its conclusion because

it viewed certain recent decisions of this Court as representing the current state of the law with regard to the requirements of notice and hearing when a person's property is at stake: "Thus although the older cases in the area of eminent domain have not been expressly overruled, the district court believed such to be the implicit result wrought by the more recent ones." 536 F. 2d at 570. The Court of Appeals overturned the District Court's holding on the ground that this Court reaffirmed its long standing holdings in the area of eminent domain when it affirmed the decision of the District Court in the *Joiner* case.

Hence, under a long and consistent line of rulings by this Court, it is clear that the Power Siting Board in determining where the line in question may be routed was under no Constitutional obligation to give Petitioner any notice of the hearing process for the route selection of that line.

CONCLUSION

For the reasons set forth above, it is clear that Petitioner has not presented this Court with an "important question of federal law which has not been settled by this Court" as required by Rule 17.1(c) of the Supreme Court Rules. To the contrary, the law as to the Constitutional issue is well settled. However, as pointed out above, there are several threshold flaws in Petitioner's arguments that eliminate the necessity to even reach the Constitutional issue presented. Hence, this Court should deny Petitioner's writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition were mailed by First Class, postage prepaid, this ____ day of October, 1982 to the following: Michael D. Rossi, Esq., Guarnieri & Secrest, 151 East Market Street, Warren, Ohio 44481, Counsel of Record for Petitioner; Thomas A. Kayuha, Esq., 76 South Main Street, Akron, Ohio 44308, Counsel of Record for Respondent, Ohio Edison Company.

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APPENDIX

OHIO REVISED CODE
STATUTES INVOLVED

Section 163.07 Notice to owners of property.

When the residence of the owners is known and is within this state, notice of the filing of a petition as provided in section 163.05 of the Revised Code shall be given to all such owners by serving a summons and a copy of such petition in the manner of service of summons in civil actions. When the residence of the owners is unknown, and as to all who cannot be served within the state, notice shall be given by publishing the substance of the petition, and a statement of the date of the filing thereof and of the date on and after which the matter may be heard, once a week for two consecutive weeks, in a newspaper of general circulation in the county, or shall be given by registered mail. When service is made by publication, section 2703.16 of the Revised Code shall be complied with.

Unless a person acquiring any interest in any property described in an appropriation petition after the filing thereof moves to be made an additional party defendant prior to the date that the case is set for the jury trial on compensation or to any journalization of a settlement entry, he shall be bound by the final judgment, without right of appeal except as to distribution, and shall receive such compensation as was awarded to his predecessor in interest to the extent that he has succeeded thereto.

Section 4906.04 Certificate for construction of major utility facility.

No person shall commence to construct a major utility facility in this state without first having obtained a

certificate for the facility. The replacement of an existing facility with a like facility, as determined by the power siting board, shall not constitute construction of a major utility facility. Such replacement of a like facility is not exempt from any other requirements of state or local laws or regulations. Any facility, with respect to which such a certificate is required, shall thereafter be constructed, operated, and maintained in conformity with such certificate and any terms, conditions, and modifications contained therein. A certificate may only be issued pursuant to Chapter 4906. of the Revised Code.

A certificate may be transferred, subject to the approval of the board, to a person who agrees to comply with the terms, conditions, and modifications contained therein.

Section 4906.06 Application for certificate; contents; publication of notice; amendment.

(B) Each application shall be accompanied by proof of service of a copy of such application on the chief executive officer of each municipal corporation and county and the head of each public agency, charged with the duty of protecting the environment or of planning land use, in the area in which any portion of such facility is to be located.

(C) Each applicant shall within seven days of the filing of the application give public notice to persons residing in the municipal corporations and counties entitled to receive notice under division (B) of this section, by the publication of a summary of the application in newspapers of general circulation in such area. Proof of such publication shall be filed with the board.

Section 4906.13 Exclusion from state or local jurisdiction.

No public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or initial operation of a major utility facility authorized by a certificate issued pursuant to Chapter 4906. of the Revised Code. Nothing herein shall prevent the application of state laws for the protection of employees engaged in the construction of such facility nor of municipal regulations that do not pertain to the location or design of, or pollution control and abatement standards for, a major utility facility for which a certificate has been granted under this chapter.

Section 4906.98 Prohibitions.

No person shall willfully construct a major utility facility without first obtaining a certificate.

No person shall willfully construct, operate, or maintain a major utility facility other than in compliance with the certificate he has obtained.

Section 4933.15 Appropriation of property by electric companies.

Any company organized for manufacturing, generating, selling, supplying, or transmitting electricity, for public and private use, may, for the purpose of making preliminary examinations and surveys, enter upon any land held by any individual or corporation, whether acquired by purchase, appropriation proceedings, or otherwise, unless such land is owned by and essential to the purposes of another corporation possessing the power of eminent domain, and may appropriate so much of such land, or any right or interest therein, including

any trees, edifices, or buildings thereon, as is deemed necessary for the erection, operation, or maintenance of an electric plant, including its generating stations, substations, switching stations, transmission and distribution lines, poles, towers, piers, conduits, cables, wires, and other necessary structures and appliances, or for rights of way over such land and adjacent lands for the purpose of access to any part of such land. The right of appropriation shall be exercised in the same manner provided by sections 163.01 to 163.22, inclusive, of the Revised Code.